Supreme Court, U.S.
FILED

08-926 JAN 22 2009

OFFICE OF THE CLERK

NO.

In The Supreme Court of the United States

DON L. RISTROPH,
Petitioner,

v.

PIPELINE TECHNOLOGY, VI, L.L.C.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

KIRK A. PATRICK III*
**Counsel of Record*
HEATHER A. CROSS
HOLLY Q. SIDES
DAVID F. ZUBER
DONOHUE PATRICK, PLLC
450 LAUREL STREET, SUITE 1500
BATON ROUGE, LOUISIANA 70801
TELEPHONE: (225) 214-1908

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED FOR REVIEW

1. Did it violate the Equal Protection Clause of the Fourteenth Amendment for the trial court to refuse to apply a statute authorizing the award of attorneys' fees in failed expropriations cases to landowners who successfully defend expropriation cases brought by private entities exercising a delegated state power when the trial court would have awarded attorneys' fees had the action been brought by the sovereign itself?

2. Is there a compelling state interest which is furthered by refusing to provide attorneys fees to landowners who defend expropriation matters instituted by private entities, when similarly situated landowners defending expropriation matters instituted by public entities would have the right to obtain attorneys fees?

3. Is there any rational basis which supports refusing to provide attorneys fees to landowners who defend expropriation matters instituted by private entities, when similarly situated landowners defending expropriation matters instituted by public entities would have the right to obtain attorneys fees?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Don Ristroph, Applicant

Pipeline Technology IV, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 2

PRESENTATION OF THE CONSTITUTIONAL ISSUES 5

LAW & ARGUMENT 7

I. THE FOURTEENTH AMENDMENT IS IMPLICATED IN THIS CASE BECAUSE EXPROPRIATION IS THE QUINTESSENTIAL STATE ACTION 8

II. THE INTERPRETATION ESPOUSED BY LEDOUX AND ADOPTED BY THE TRIAL COURT, CREATES AN UNCONSTITUTIONAL DISTINCTION IN TREATMENT BETWEEN SIMILARLY SITUATED LITIGANTS 12

III. THE DISTINCTION IN TREATMENT BETWEEN LANDOWNERS BATTLING "PRIVATE" EXPROPRIATION AND "PUBLIC" EXPROPRIATION IS NOT SUPPORTED BY A COMPELLING STATE INTEREST 18

IV. THE DISTINCTION IN TREATMENT BETWEEN LANDOWNERS BATTLING "PRIVATE" EXPROPRIATION AND "PUBLIC" EXPROPRIATION IS NOT SUPPORTED BY ANY RATIONAL BASIS 24

CONCLUSION 26

APPENDICES A-1

Order of Supreme Court of Louisiana Dated October 24, 2008 ..... A-1

Order of Louisiana Court of Appeals Dated June 25, 2008 ..... A-3

Judgment of Louisiana Court of Appeals Dated May 2, 2008 ..... A-4

Judgment of 18th Judicial District Court Dated March 1, 2007 ..... A-19

Opinion of 18th Judicial District Court Dated January 19, 2007 ..... A-21

TABLE OF AUTHORITIES

Page(s)

CASES

Bearden v. State of Georgia, 461 U.S. 660 (1983) . . 20

Boom Company v. Patterson, 98 U.S. 403 (1878) . . . 11

Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2000) 9, 10, 12

Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 13, 24, 25

Griffin v. Illinois, 351 U.S. 12 (1956) 20

Jackson v. Metropolitan Enterprises, 419 U.S. 345 (1974) 9, 11, 12

Lawrence v. Texas, 539 U.S. 558 (2003) 13

Louisiana Intrastate Gas Corp. v. Ledoux, 347 So.2d 4 (La. App. 3rd Cir. 1977) . . . . . *passim*

M.L.B. v. S.L.J., 579 U.S. 102 (1996) 19, 20, 21

Mayer v. Chicago, 404 U.S. 189 (1971) 20

Mongrue v. Monsanto Co., 249 F.3d 422 (5th Cir. 2001) 15

Morse v. Republican Party of Virginia, 517 U.S. 186 (1996) 11

Pipeline Technology VI, LLC v. Ristroph, (La. App. 1 Cir.) 991 So.2d 1 (2008) . . 1, 5, 6, 15

Pipeline Technology VI, LLC v. Ristroph, (La.) 992 So.2d 1037 (2008) 1, 5, 7

Plyer v. Doe, 457 U.S. 202 (1982) 18, 22

Ross v. Moffit, 417 U.S. 600 (1974) 20

State of Georgia v. City of Chattanooga,
264 U.S. 472 (1924) 10, 11

Thompson v. Consolidated Gas Utilities Corp.,
300 U.S. 55, 80, 57 S.Ct. 364 (1937) 18

U.S. v. Morrison, 529 US 598 (2000) 9

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980) 19

Wilson v. DOTD, 464 So.2d 343
(La. App. 5th Cir. 1985) 18

Zoebel v. Williams, 457 U.S. 55 (1982) 24

FEDERAL STATUTES

28 U.S.C. § 2403(b) 2

STATE STATUTES

La. Civ. Code Article 2989 14

La. R.S. § 19:2(8) 2, 12

La. R.S. § 19:201 ..... *passim*

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend XIV, §1 ..... 2, 9, 18

MISCELLANEOUS

Restatement 3d of Agency § 1.01,
comment (c) (2006) 15

STATEMENT OF JURISDICTION

This Writ of Certiorari is taken from a ruling by the trial court denying a Motion to Tax Costs and Attorneys Fees submitted by the Applicant, Don Ristroph after he prevailed in the trial of the merits in an expropriation proceeding brought against him by Pipeline Technology VI, LLC. The order on the Motion to Tax Costs and Attorneys' fees was issued in open court by the Honorable William Dupont on February 3, 2007.[1] The order was appealed by Applicant Don Ristroph and affirmed by the Louisiana First Circuit Court of Appeal on May 2, 2008.[2] Mr. Ristroph submitted a Motion for Rehearing on the Judgment of the First Circuit Court of Appeal, which was denied by the First Circuit on June 25, 2008.[3] Mr. Ristroph then applied for a Writ of Certiorari with Louisiana Supreme Court and the Writ Application was denied on October 24, 2008.[4]

At issue in the instant Writ of Certiorari is whether the statute allowing the recovery of attorney fees in expropriation cases, La. R.S. § 19:201, is unconstitutional as applied in this case under the Equal Protection clause of the Fourteenth Amendment which states as follows:

---

[1] *See*: February 23, 2007, Transcript of Proceedings, pp. 57-58.

[2] *See*: *Pipeline Technology VI, LLC v. Ristroph*, 2007-1210 (La. App. 1 Cir. 5/2/08) 991 So.2d 1.

[3] *See*: Order of First Circuit Court of Appeal denying rehearing, June 25, 2008.

[4] *See*: *Pipeline Technology VI, LLC v. Ristroph* 2008-1676 (La. 10/24/08) 992 So.2d 1037.

> [N]or shall any State . . .deny to any person within its jurisdiction the equal protection of the laws.[5]

Accordingly, 28 U.S.C. § 2403(b) may apply herein, and this Application will be served on the Honorable James D. "Buddy" Caldwell, Attorney General for the State of Louisiana, in an abundance of caution.

STATEMENT OF THE CASE

This case arises out the attempted expropriation of Don Ristroph's family property in Iberville Parish, Louisiana by a private pipeline company called Pipeline Technology, VI, LLC, (hereinafter "Pipeline Technology"). Pipeline Technology hoped to forcibly take the Ristroph Tract in order to construct a benzene pipeline. The pipeline was planned to transport benzene from Dow Chemical Company's plant in Plaquemine, Louisiana to Dow's customer for the benzene, Total Petrochemical Plant located in Carville, Louisiana.

Pipeline Technology was delegated expropriation powers when the State of Louisiana through the Louisiana Public Service Commission classified it as a common carrier and issued it a common carrier certificate. Among other things, a common carrier is one of the types of private entities to which the State of Louisiana delegates its expropriation powers.[6] Pipeline Technology attempted expropriation through this state

---

[5] U.S. Const. Amend XIV, §1.

[6] La. R.S. § 19:2(8).

delegated power by filing suit against Mr. Ristroph in the Eighteenth Judicial District Court for the State of Louisiana in Plaquemine, Louisiana.

The expropriation failed and Pipeline Technology was found to have abused its expropriation powers and to have acted arbitrarily and capriciously in its attempt to expropriate. Mr. Ristroph exerted considerable time and expense defending against these proceedings. This case involved a complex two-day trial, several expert witnesses and months of discovery. Mr. Ristroph funded this litigation at his own expense in an effort to protect his property rights and at the end incurred over $150,000 in legal expenses.

After the trial, the Eighteenth Judicial Court, Honorable William Dupont held that Pipeline Technology "failed to prove the public and necessary purpose of this pipeline" and that Don Ristroph sustained his burden of proving that Pipeline Technology was "arbitrary and capricious" in selecting a pipeline route across his property.[7]

Following the judgment, Mr. Ristroph moved to assess Pipeline Technology with his costs and attorneys fees. Under Louisiana Law as set forth in La. R.S. § 19:201, attorneys' fees are allowed to a landowner who successfully defends against an expropriation brought by the state or an "agency" of the state. At a hearing on the issue, the trial court denied Mr. Ristroph's request for attorneys' fees in open court. The Court emphasized that it felt constrained by a decision rendered by the Louisiana

---

[7] *See*: Opinion of the Trial Court, January 19, 2007, RN 879.

Third Circuit Court of Appeal, *Louisiana Intrastate Gas Corp. v. Ledoux*,[8] The Court found that the *Ledoux* case would hold that La. R.S. § 19:201 only allowed attorneys' fees when the expropriation at issue was instituted by a public body. The District Court noted that there was no reason for there to be a distinction in expropriation proceedings brought by public bodies, or privately owned corporations who are delegated state powers to expropriate. Despite the fact that Mr. Ristroph pointed to the Equal Protection concerns created by the disparate treatment between expropriations instituted by public bodies and private corporations[9], the District Court found that it was constrained to follow *Ledoux*:

> They didn't put it into the same one to that we think the private entity is an agent of the State. I mean, I don't like it but I'm faced with a Court of Appeal decision and that writs denied by the Supreme Court and in the writ denial they actually said the law is correct. I just feel my hands are tied. I don't like it. I believe your client should be able to get his attorney fees from a private entity, especially since you can get them from the State....If one gets it, both ought to get it.[10]

---

[8] *Louisiana Intrastate Gas Corp. v. Ledoux*, 347 So.2d 4 (La. App. 3rd Cir. 1977).

[9] *See*: Memorandum in Support of Motion to Tax Costs, pp.8-10.

[10] February 23, 2007 Transcript at 57 – 58.

The trial court's holding was affirmed by the Louisiana First Circuit Court of Appeal[11] which affirmed the trial court's reluctant adherence to *Ledoux*.

PRESENTATION OF THE CONSTITUTIONAL ISSUES

Mr. Ristroph has consistently presented the equal protection implications presented by the *Ledoux* interpretations. He first raised the equal protection issue with the trial courts in the Motion to Tax Costs and Attorneys Fees.[12] Mr. Ristroph pointed out, as he does in the instant case that the *Ledoux* interpretation violated the Equal Protection clause, and it was not supported by any rational basis or compelling state interest.[13] The trial court did not address this issue in its holding.[14]

Mr. Ristroph appealed the ruling on the Motion to Tax Costs and Attorneys' Fees on several grounds. One of the errors assigned on the appeal was:

> [T]o interpret La. R.S. § 19:201 in a manner that would allow for attorney fees to be available only in public entity expropriation suits but not in "private"

---

[11] *Pipeline Technology VI, LLC v. Ristroph*, 2007-1210 (La. App. 1 Cir. 5/2/08), 991 So.2d 1, writ denied 2008-1676 (La. 10/24/2008) 992 So.2d 1037.

[12] *See*: Memorandum in Support of Motion to Tax Costs and Attorneys Fees ,pp. 8-10.

[13] *See*: Memorandum in Support of Motion to Tax Costs and Attorneys Fees, p. 9.

[14] *See* Transcript from hearing, February 23, 2007.

> entity expropriation would violate the Equal Protection clauses of the United States and Louisiana Constitutions by distinguishing landowners based on the public or private nature of the entity attempting to expropriate their land.[15]

Despite again pointing to the federal Equal Protection concerns presented by the application of La. R.S. § 19:201, the Louisiana First Circuit Court of Appeal did not address the federal issues in its holding. The only constitutional issues the First Circuit addressed related to the Louisiana State Constitution.[16]

Mr. Ristroph then moved for rehearing with the Louisiana First Circuit Court of Appeal and specifically requested that the First Circuit address the Equal Protection issue, stating: "Left unaddressed by the District Court and this Court on the original appeal was how the erroneous interpretation espoused by *Ledoux* and Pipeline Technology has led to an unconstitutional application of Louisiana expropriation law. This error should be corrected on rehearing."[17] Therefore, the Equal Protection issue was briefed, yet again to

---

[15] *See*: Appeal Brief of Don Ristroph to Louisiana State First Circuit Court of Appeal, pp. 14-15.

[16] *See*: *Pipeline Technology VI, LLC*, 991 So.2d 1.

[17] See: Memorandum in Support of Motion for Rehearing, p. 2.

the Louisiana First Circuit Court of Appeal. [18] The First Circuit denied the request for rehearing.[19]

Mr. Ristroph continued his appeal through the Louisiana state court system, then addressing the same Equal Protection concerns in his writ application to the Louisiana Supreme Court. [20] The Louisiana Supreme Court denied writs, and therefore did not address the Equal Protection issues.[21] Now, the Applicant, Don Ristroph, seeks relief from this Honorable Court because the interpretation of La. R.S. § 19:201 espoused by the trial court, the *Ledoux* holding, and the Louisiana First Circuit Court of Appeal decision in the instant case results in a violation of Mr. Ristroph's right to equal protection under the Law.

LAW & ARGUMENT

As discussed in detail below, the trial court should have awarded Mr. Ristroph, the Applicant herein, the attorneys' fees he incurred in battling a failed attempt by Pipeline Technology to exercise its state-delegated expropriation powers. The award of attorney's fees is supported by the plain language of the statute authorizing attorneys' fees in expropriation cases, La. R.S. § 19:201. The interpretation annunciated by the Louisiana Third

---

[18] *See*: Memorandum in Support of Motion for Rehearing, pp. 4-7.

[19] See: Order of the Louisiana First Circuit Court of Appeal denying rehearing, entered June 25, 2008.

[20] *See*: Memorandum in Support of Writ of Certiorari, Louisiana Supreme Court, Section III, pp. 14-15.

[21] *See: Pipeline Technology VI, LLC v. Ristroph*, 2008-1676 (La. 10/24/08) 992 So.2d 1037.

Circuit Court of Appeal in the *Ledoux* case, and followed by the trial court and the First Circuit Court of Appeal in the instant case, creates two classes of landowners who are battling the same state powers: those fighting an entity named "the State of Louisiana" are awarded attorney fees, and those battling an entity bearing the name of a private corporation are not so entitled. This differing treatment means that a landowner who battles a state power when exercised by a private party is afforded less protection than a similarly situated landowner battling the same state power exercised by the state itself. This discrimination is not supported by any compelling state interest or any rational basis. Accordingly, it violates the Federal equal protection rights of those landowners who face an expropriation action instituted by a private entity. This Court should grant this Writ of Certiorari to correct the violation.

I. THE FOURTEENTH AMENDMENT IS IMPLICATED IN THIS CASE BECAUSE EXPROPRIATION IS THE QUINTESSENTIAL STATE ACTION

As all citizens, Mr. Ristroph is provided with the guarantees of the Fourteenth Amendment § 1 which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

> the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; ***nor deny to any person within its jurisdiction the equal protection of the laws.***[22]

It is well-recognized that "the action inhibited by the First Section of the Fourteenth Amendment is only such action as may be fairly said to be that of the States. The Amendment enacts no shield against merely private conduct, however, discriminatory or wrongful." *U.S. v. Morrison*, 529 US 598, 621, 120 Sct. 1740, 1756 (2000). This Court has found that state action can be found "only if there is such a 'close nexus between the state and the challenged action' that seemingly private behavior 'may be fairly treated as that of the state itself."[23] In *Brentwood Academy v. Tennessee Secondary School Athletic Association,* this Court delineated the circumstances under which a private party may be considered a state actor for purposes of the application of the Fourteenth Amendment:

> We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," when the State provides "significant encouragement, either overt or covert," or when a private actor operates as a "willful

---

[22] U.S. Const. Amend XIV, §1 (Emphasis added).

[23] *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 295, 121 S.Ct. 924, 930, 148 L.Ed.2d 807 (2000), quoting, *Jackson v. Metropolitan Enterprises*, 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974).

> participant in joint activity with the State or its agents," We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," ***when it has been delegated a public function by the State***, when it is "entwined with governmental policies," or when government is "entwined in [its] management or control." [24]

This case represents one of those instances where the State may be considered to have "delegated a public function of the State."[25] This Court has routinely cited expropriation powers and the right of eminent domain as examples of a public function of the State. This Court has noted that:

> [T]he power of eminent domain is an attribute of sovereignty and inheres in every independent state. . . The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state. It cannot be surrendered and if attempted to be contracted away, it may be resumed at will. [26]

---

[24] *Brentwood Academy*, 531 U.S. 288 at 295 (internal citations omitted); (emphasis added).

[25] *Id.*

[26] *State of Georgia v. City of Chattanooga*, 264 U.S. 472, 480, 44 S.Ct. 369, 68 L.Ed. 796 (1924).

According to this Court, a state's powers of eminent domain may be "delegated to private corporations, to be exercised by them in the execution of works in which the public is interested."[27] As a result, even if the power of expropriation is delegated to a private corporation as it was in the instant case, the power of eminent domain remains exclusively a state function, which the State may resume at will.[28]

Under this rationale, this Court has repeatedly cited delegation of expropriation powers as an example of a state's delegation of a public function for purposes of the state action requirement of the Fourteenth Amendment. In *Jackson v. Metropolitan Edison Co.*, Chief Justice Rehnquist observed that:

> We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State. If we were dealing with the exercise by [the utility company] of some power delegated to it by the State which is traditionally associated with sovereignty, ***such as eminent domain***, our case would be quite a different one.[29]

---

[27] *Boom Company v. Patterson*, 98 U.S. 403, 406, 25 L.Ed. 206 (1878).

[28] *Georgia*, 264 U.S. at 480.

[29] *Jackson v. Metropolitan Edison Co*, 419 U.S. 345, 352-53, 95 S.Ct. 449, 454 (1974) (emphasis added); *See Also*: *Morse v.*

In short, expropriation power is well-recognized to be a power which "traditionally exclusively reserved to the State."[30] Further, it is clear that by virtue of the State's issuance of a common carrier certificate and its statutory delegation of authority[31], this is a case where the private actor becomes a state actor because "it has been delegated a public function by the State."[32]

Despite Pipeline Technology's insistence on state appeals that it is a private actor, for purposes of consideration of this case and the constitutional questions that it presents, Pipeline Technology is for all intents and purposes a state actor, when exercising its state delegated expropriation powers. Therefore, its actions are governed by the United States Constitution, and specifically the Equal Protection Clause of the Fourteenth Amendment.

II. THE INTERPRETATION ESPOUSED BY *LEDOUX* AND ADOPTED BY THE TRIAL COURT, CREATES AN UNCONSTITUTIONAL DISTINCTION IN TREATMENT BETWEEN SIMILARLY SITUATED LITIGANTS

This Court has recognized that: "The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly

---

Republican Party of Virginia, 517 U.S. 186, 272, 116 S.Ct. 1186, 1232, 134 L.Ed.2d 347 (1996) (citing *Jackson's* example).

[30] *Id.*

[31] *See*: La. R.S. § 19:2(8).

[32] *Brentwood Academy*, 531 U.S. at 295.

situated should be treated alike."[33] As discussed above, the interpretation presented by the Louisiana Third Circuit Court of Appeals in the *Ledoux* decision, as well as the Louisiana Courts considering Mr. Ristroph's case results in a distinction in treatment under the law between two "similarly situated" groups of individuals: those defending expropriation proceedings instituted by the state and those like Mr. Ristroph, defending expropriation proceedings instituted by private corporations exercising state-delegated expropriation powers. This distinction is both unnecessary and unconstitutional.

Don Ristroph's entitlement to attorneys' fees is set forth in under La. R.S. §19:201, which provides:

> **201. Attorney fees; unsuccessful or abandoned expropriation suits**
>
> A court of Louisiana having jurisdiction of a proceeding instituted by the State of Louisiana, a parish, a municipality ***or an agency of any of them vested with the power of expropriation,*** to acquire real property by expropriation, shall award the owner of any right, or title to, or interest in such real property such sum as will, in the opinion of the court, reimburse such owner for his

---

[33] *Lawrence v. Texas*, 539 U.S. 558, 579, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), quoting, *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

> reasonable attorney fees actually incurred because of the expropriation proceeding, if the final judgment is that the plaintiff cannot acquire the real property by expropriation or if the proceeding is abandoned by the plaintiff. Any such award shall be paid from the same funds from which the purchase price of the property would have been paid.
>
> The rights of the landowner herein fixed are in addition to any other rights he may have under the Constitution of Louisiana.[31]

Under the plain language of La. R.S. §19:201, a landowner is entitled to be reimbursed for the attorney fees he incurred in defending an expropriation proceeding brought by the state, or an "agency of" the state. Pipeline Technology would have been glad to use the state's rights and benefits of expropriation, yet somehow it seeks to avoid the responsibility imposed by La. R.S. 19:201 by arguing that it is not considered to be a state's agent when using the state's power. It seems inconsistent with the concept of agency itself (which is recognized under Louisiana Law in the Civil Law doctrine of 'Mandate')[35] to conclude that Pipeline Technology is not a state agent.

The common understanding of an agency relationship is: "a consensual relationship in which

---

[31] La. R.S. §19:201 (emphasis added).

[35] La. Civ. Code Article 2989.

one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person."[36] The agency concept has been applied to private corporations exercising the state powers of expropriation setting. For example, in *Mongrue v. Monsanto Company*, the United States Fifth Circuit Court of Appeals found that "[f]or a private entity to qualify under Louisiana law ***as an agent of the government*** for the purpose of establishing liability for an unconstitutional taking, the entity must have been expressly delegated the power of eminent domain."[37]

Pipeline Technology relied on the expressly delegated power of eminent domain in bringing this action. Therefore, when Pipeline Technology sued Mr. Ristroph to take his property, it utilized the "agency" authority granted by its principal, the State of Louisiana, when it sued Mr. Ristroph to take his property. Under the plain language of La. R.S. § 19:201, Pipeline Technology would be an "agency" of the State. Therefore, Mr. Ristroph should be entitled to an award of attorneys' fees.

Unfortunately, the trial court and the appellate courts in Louisiana distinguished Mr.

---

[36] Restatement 3d of Agency § 1.01, comment (c) (2006).

[37] *Mongrue v. Monsanto Co.*, 249 F.3d 422, 429 (5th Cir. 2001). Note: The Louisiana First Circuit Court of Appeal recognized that *Mongrue* would imply that a private corporation would be considered a state agent for expropriation purposes, and did not attempt to disagree with the concept. Nonetheless, it dismissed the *Mongrue* language as *dicta*, and passed no further comment upon it. *See: Pipeline Technology*, 991 So. 2d at 4.

Ristroph's claim for attorneys fees made against a private corporation exercising state power from a claim for attorneys' fees which could be brought by a similarly situated landowner who was defending against a public body. This decision has its roots in a 1977 appellate court opinion issued by the Louisiana Third Circuit Court of Appeal, *Louisiana Intrastate Gas Corp. v. Ledoux.* [38] In *Ledoux,* the Louisiana Third Circuit Court of Appeal considered a claim for attorneys' fees brought by a prevailing landowner who battled a private pipeline corporation attempting to expropriate the landowner's private property. The Court denied his request, holding that:

> In these expropriation cases the expropriating authority is not the state, a parish or municipality or an agency of either, hence the provisions of LSA R.S. 19:201 do not apply. The Legislature in enacting this section, ***for whatever reason, limited recovery of attorney fees to unsuccessful expropriation proceedings brought by the State, its political subdivisions and agencies.*** We are powerless to extend by analogy not included within its scope. Private entities with power to expropriate are not subject to the penalty set out in LSA-R.S. 19:201. [39]

---

[38] *Louisiana Intrastate Gas Corp. v. Ledoux,* 347 So.2d 4 (La. App. 3rd Cir 1977).

[39] *Ledoux,* 347 So.2d at 7 (Emphasis added).

In short, the *Ledoux* court recognized the discrimination facing litigants battling wrongfully instituted expropriation proceedings, and further recognized that there was no justification for treating landowners like Mr. Ristroph any differently than those battling State-instituted expropriation proceedings. Nonetheless, the *Ledoux* court decided to draw the distinction.

The trial court also recognized that although the interpretation created a distinction between landowners who defend against public entities and private corporations, there seemed to be no real or articulated reason for the distinction, and ultimately stated that "If one gets it, both ought to get it." [40]

As discussed in detail below, the distinction drawn by the *Ledoux* court and the courts considering this matter denies Mr. Ristroph, and landowners similarly situated to him the Equal Protection of the Law as guaranteed by the Fourteenth Amendment. Mr. Ristroph contends that the disparity impacts a fundamental right, that of defending against an expropriation proceeding, and as such, this interpretation must be able to survive "strict scrutiny" analysis and the distinction must be supported by a compelling state interest. If this Court should find that no fundamental right is at stake, this interpretation nonetheless creates disparate treatment of two classes of individuals. All courts which have considered this issue have acknowledged the distinction is not supported by any rational basis. Therefore, even assuming no fundamental right is at stake, the interpretation

---

[40] February 23, 2007, Transcript pp. 57-58.

afforded La. R.S. §19:201 by the Courts in this matter is unconstitutional.

III. THE DISTINCTION IN TREATMENT BETWEEN LANDOWNERS BATTLING "PRIVATE" EXPROPRIATION AND "PUBLIC" EXPROPRIATION IS NOT SUPPORTED BY A COMPELLING STATE INTEREST

The ability to defend against a state sanctioned expropriation is a fundamental right.[41] This Court has noted that in determining the existence of a fundamental right, "we look to the constitution to see if the right infringed has its source, explicitly or implicitly, therein."[42] The existence of a fundamental right to contest an expropriation is not only implied in the nature of a free society, but set forth expressly in the Fourteenth Amendment to the Constitution, which states that: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."[43] Accordingly, this Court has recognized that even when the state right of eminent domain is employed: "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."[44] If the State of Louisiana is prohibited from

---

[41] The Louisiana Courts have expressly recognized this fundamental liberty. *See*: *Wilson v. DOTD*, 464 So.2d 343 (La. App. 5th Cir. 1985).

[42] *Plyer v. Doe*, 457 U.S. 202, n. 15, 1025. ct. 2382, 72 L.Ed.2d (1982).

[43] U.S. Const. Amendment XIV, §1.

[44] *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80, 57 S.Ct. 364 (1937). The Fifth Amendment prohibition

depriving Mr. Ristroph of his property without due process; and the State of Louisiana is prohibited from taking his property for the "benefit of another private person without a justifying public purpose" then it logically follows that Mr. Ristroph must be afforded an opportunity to contest the taking, and the existence of a public purpose justifying the taking. This right is fundamental, and should not be denied.

Undoubtedly, La. R.S. § 19:201 was enacted to protect landowners from harm when pursuing this fundamental liberty. Under the construction espoused by the *Ledoux* decision, landowners who find themselves sued by a private actor that is actually exercising a governmental power find themselves with less protection than when the State exercises the same power itself. In order to determine whether the disparate treatment suffered by those in Mr. Ristroph's situation is inimical to the Equal Protection clause, this Court must examine the state's basis for the differing treatment.

In considering whether such a distinction between expropriation litigants will violate the Equal Protection clause, the case of *M.L.B. v. S.L.J.* is instructive. [15] In *M.L.B.*, the Court analyzed whether a state could require a litigant to pay the cost of preparing a transcript in order to pursue an

---

against the taking of private property for public use without just compensation applies against the States through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160, 101 S.Ct. 446, 450, 66 L.Ed.2d 358.

[15] *M.L.B. v. S.L.J.*, 579 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996).

appeal. The Court was examining the appeal of an order which revoked the applicant's right to custody and visitation of her children. The applicant was indigent and unable to pay the costs of the appeal. The Court concluded that an equal protection analysis was appropriate to analyze the issues at bar, noting that the case presented discrimination to indigent appellants as opposed to those who may be able to pay the cost of an appeal. It noted in pertinent part that:

> We observe first that the Court's decisions concerning access to judicial process . . . reflect both equal protection and due process concerns. . . . Nevertheless, most decisions in this area, we have recognized, rest on an equal protection framework . . .In line with those decisions, we inspect the character and intensity of the individual interest at stake on the one hand and the State's justification for its exaction, on the other.[16]

The Court recognized that the case involved an appeal, which as an ordinary matter would not be granted to a litigant as a matter of due process.[17] However, the Court found that where a fundamental right was implicated in the litigation, the courts

---

[16] *Id.*, at 120-121, citing, *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct 585, 100 L.Ed. 891 (1956); *Mayer v. Chicago*, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971); *Ross v. Moffit*, 417 U.S. 600, 608-09, 94 S.Ct. 2437, 2442-43, 41 L.Ed. 2d 341 (1974); *Bearden v. State of Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

[17] *Id.*, at 120.

could not "bolt the door to equal justice."[48] Therefore, the Court found that it must weigh the interest of the litigant on one hand and the countervailing state interest on the other in determining whether the *M.L.B.* applicant should be granted an appeal regardless of her opportunity to pay the court costs for preparing a transcript.

Like the applicant in the *M.L.B.* case, Mr. Ristroph is exercising a fundamental right when defending against the expropriation proceedings. Essentially, the distinction drawn by the *Ledoux* case would "bolt the door to equal justice" in instances where landowners are exercising their fundamental right to defend expropriation proceedings. Landowners battling traditional state institutions have greater protection under the law (*i.e.* they would be entitled to recover their attorneys' fees) than those, like Mr. Ristroph, who are battling private corporations wielding the same state authority. Landowners facing expropriation proceedings instituted by the State itself are, under *Ledoux* granted the protection of their fundamental right to contest eminent domain by the award of attorneys' fees if the State is found to have exceeded its authority. Landowners like Mr. Ristroph are denied this protection.

Under the Equal Protection Clause, this Court has instructed that if the distinction between similarly situated litigants operates to impinge on some fundamental right explicitly or implicitly protected by the Constitution, strict judicial scrutiny

---

[48] *Id.* at 124.

of the distinction is required.[49] Since the *Ledoux* interpretation of La. R.S. § 19:201 drew a distinction impairing the fundamental right to contest expropriation, it was up to Pipeline Technology to show that the *LeDoux* interpretation is "precisely tailored to serve a compelling governmental interest." [50]

Pipeline Technology did not identify any compelling state interest which would support the disparate treatment given to victims of public body expropriation, and private body expropriation. Further, the Courts considering the issues, failed to articulate even a rational basis for the distinction in the law. Rather, both the District Court and the *Ledoux* court seemed to indicate that they found no reason, or state interest, which would justify the distinction at all.

The *Ledoux* court, which originally announced the distinction in the law, commented upon the distinction stating that: "[t]he Legislature in enacting this section, ***for whatever reason***, limited recovery of attorney fees to unsuccessful expropriation proceedings brought by the State, its political subdivisions and agencies."[51] This language indicates that the Louisiana Legislature may have had a reason for treating the similarly situated landowners differently, but that reason was certainly unclear at best, and absent at worse. Whether the rationale for the distinction is unclear or absent, it certainly cannot said to be compelling.

---

[49] *Plyer*, 457 U.S. at 216-17.

[50] *Id.*

[51] *Ledoux*, 347 So.2d at 7 (emphasis added).

The trial court in the instant case also indicated that no logical reason justified any disparate treatment of litigants in expropriation cases. In ruling on the issue the District Court stated: "I believe your client [Mr. Ristroph] should be able to get his attorney fees from a private entity, especially since you can get them from the State....If one gets it, both ought to get it" [52] In essence, the trial court impliedly recognized that there was no real justification for treating each of the landowners differently. Regardless, the trial court, while recognizing the lack of a compelling state interest justifying the distinction in treatment, decided to apply the distinction anyway. This error should be corrected by this Court, as it was not addressed by the Louisiana First Circuit Court of Appeal or the Louisiana Supreme Court.

In short, whether they are battling public entities like a parishes or municipalities, or whether they are battling private corporations, defendants in expropriation proceedings are battling the exercise of a state power. The discrimination in the treatment some of these landowners must be supported by a compelling state interest, otherwise, "if one gets it, both ought to get it." No compelling interest exists supports any other conclusion. Thus, this Court should take the opportunity to correct the unconstitutional application of La. R.S. § 19:201 and award Mr. Ristroph his attorneys' fees.

---

[52] February 23, 2007 Transcript at 57 – 58.

IV. THE DISTINCTION IN TREATMENT BETWEEN LANDOWNERS BATTLING "PRIVATE" EXPROPRIATION AND "PUBLIC" EXPROPRIATION IS NOT SUPPORTED BY ANY RATIONAL BASIS

This Court has recognized that even if the "strict scrutiny" analysis would not apply, Mr. Ristroph, and those similarly situated to him would not be "entirely unprotected from invidious discrimination." [53] The state may not "rely on a classification whose relationship is so attenuated as to render the distinction *arbitrary or irrational*." [54] Rather, the state must present some rational basis for its distinction in the law.

In this case, every court examining the issue has been unable to point to any reason, much less any rational one, supporting the distinction in treatment between landowners who face expropriations instituted by the state itself, and those, who like Mr. Ristroph battle a private corporation exercising state delegated powers.

Pipeline Technology advanced the following rationale in favor of the distinction:

> There are rational reasons for the Legislature's decision to allow for the recovery of attorney fees against governmental expropriations, even in the event the expropriator does not

---

[53] *Cleburne*, 473 U.S. at 446.

[54] *Cleburne*, 473 U.S. at 446, citing *Zoebel v. Williams*, 457 U.S. 55, 61-63, 102 S.Ct. 2309, 2313-2314, 72 L.Ed. 2d 672 (1982).

> obtain a judgment or abandons the expropriation. In many instances, the State of Louisiana and its political subdivisions and agencies have a quick taking authority which private entities do not have. . . Ristroph does not have that concern with this private expropriation. [55]

There are several problems with this rationale. First, La. R.S. §19:201 is in no way specific to expropriation proceedings which involve a quick taking, so it is difficult to see how this could have been a concern. More significantly, Pipeline Technology has not addressed why its concerns would be any different than those faced by the state when litigating the validity of its power to expropriate. Whether battling the State of Louisiana in name, or whether battling a private corporation exercising a state power, the landowner is battling the same state power. There is no such thing as a "private expropriation." If taken at its word Pipeline Technology is truly acting to advance the public interest through the exercise of a state-delegated power, then its interests and the state's interests in this case are actually one in the same.

To pass muster under the Fourteenth Amendment, a distinction in treatment between similarly situated litigants may not be arbitrary; any classifications must be rational.[56] At the end of the

---

[55] *See:* Pipeline Technology's Opposition to the Writ Application to the Louisiana Supreme Court, p. 16. *See Also*: Pipeline Technology's Appellee Brief to the Louisiana First Circuit Court of Appeal, pp. 15-16.

[56] *Cleburne*, 473 U.S. at 446.

day, there is absolutely no reason, rational or otherwise which would require Mr. Ristroph, and those like him to be treated any differently than those similarly situated litigants who through no fault of their own find themselves battling expropriation actions brought by traditionally conceived of state agencies like transportation and development, or other state capital improvement projects. Considering the fact that no court examining this matter could articulate any reason supporting the distinction, the distinction can be nothing short of arbitrary. Accordingly, this Court should exercise its discretion to correct the errors and unconstitutional application of La. R.S. § 19:201.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that this Honorable Court grant writ of certiorari.

Respectfully Submitted,

KIRK A. PATRICK III*
**Counsel of Record*
HEATHER A. CROSS
HOLLY Q. SIDES
DAVID F. ZUBER
DONOHUE PATRICK, PLLC
450 LAUREL STREET, SUITE 1500
BATON ROUGE, LOUISIANA 70801
TELEPHONE: (225) 214-1908

THE SUPREME COURT OF THE STATE OF LOUISIANA

PIPELINE TECHNOLOGY VI, LLC

VS. NO. 2008-C-1676

DON L. RISTROPH

IN RE: Ristroph, Don L.; - Defendant; Applying for Writ of Certiorari and/or Review, Parish of Iberville, 18th Judicial District Court Div. D, Nos. 63573; to the Court of Appeal, First Circuit, No. 2007 CA 1210.

October 24, 2008

Denied.

PFC

CDK

BJJ

JPV

CDT

JTK

JLW

Supreme Court of
Louisiana
October 24, 2008

s/Rai T. Daigle
Deputy
Clerk of Court
For the Court

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

RE: Docket Number 2007-CA-1210

Pipeline Technology VI, L.L.C.

- - Versus - -

Don L. Ristroph

18th Judicial District Court

Case #: 63573

Iberville Parish

On Application for Rehearing filed on 5/15/2008

Rehearing: Denied

s/Randolph H. Parro

s/James E. Kuhn

s/Robert D. Downing

Filed Jun 25, 2008
s/Christine L. Crow, Clerk

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 1210

PIPELINE TECHNOLOGY VI, LLC

VERSUS

DON L. RISTROPH

Judgment rendered: May 2, 2008

****

On Appeal from the 18th Judicial District Court
Parish of Iberville, State of Louisiana
Case Number 63573; Division D
The Honorable William C. Dupont, Judge Presiding

****

James P. Doré
Linda S. Akchin
Counsel for Plaintiff/Appellee

Pipeline Technology VI, LLC
Baton Rouge, LA

Kirk A. Patrick, III
David F. Zuber
Counsel for Defendant/Appellant
Don L. Ristroph
Baton Rouge, LA

BEFORE: PARRO, KUHN AND DOWNING, JJ.

DOWNING, J.

This is an appeal by a landowner who defeated an expropriation action instituted by a private pipeline company. There are three issues on appeal: (1) whether the trial court erred in failing to award the landowner attorney's fees; (2) whether the trial court erred in excluding two of the landowner's witnesses prior to trial; and (3) whether the trial court erred in failing to award some of the landowner's expert witness fees. For the following reasons, we affirm the trial court judgment that denied the landowner's claim for attorney fees, excluded two of his expert witnesses, and denied his claim for some expert witness fees.

FACTS AND PROCEDURAL HISTORY

Don L. Ristroph, the defendant/appellant landowner, successfully thwarted Pipeline Technology VI, LLC's (PTVI) lawsuit to expropriate a servitude across his property to lay a benzene

pipeline. Prior to trial, PTVI's motion in limine was granted, and two experts who were scheduled to testify on Mr. Ristroph's behalf were excluded by the trial court. A bench trial was held on November 28-30, 2006; the trial court rule in favor of Mr. Ristroph and dismissed PTVI's expropriation action with prejudice. At a hearing on a motion to tax costs, the trial court denied Mr. Ristroph's claim for attorney fees. It also denied Mr. Ristroph's claim for costs he had paid to the experts excluded prior to trial. The trial court also declined to award the total claimed costs of Mr. Ristroph's other expert witnesses. Judgment was signed accordingly. Both Mr. Ristroph and PTVI appealed the judgment. PTVI, however, moved to dismiss its appeal on February 12, 2008, reserving all defenses and rights to the appeal field by Mr. Ristroph. The dismissal was granted, and only Mr. Ristroph's appeal remains.

DISCUSSION

FAILURE TO AWARD ATTORNEY FEES

In Mr. Ristroph's first assignment of error, he alleges that the trial court erred in failing to award attorney fees on two grounds: (1) pursuant to La. R.S. 19:201 and (2) pursuant to La. Constr. Art. 1, § 4.

Statutory Provision for Attorney Fees

Under Louisiana law, attorney fees are not allowed except where authorized by statute or by contract. **Smith v. Albrecht**, 06-2072, p.5 (La.App. 1 Cir. 6/8/07), 965 So.2d 879, 882. Thus, unless Mr. Ristroph can show a pertinent statute or contract providing for an award of attorney fees, such fees are not awardable.

Louisiana Revised Statute 19:201 provides as follows:

> A court of Louisiana having jurisdiction of a **proceeding instituted by the State of Louisiana, a parish, a municipality or an agency or any of them vested with the power of expropriation, to acquire real property by expropriation, shall award the owner of any right, or title to, or interest in such real property such sum as will, in the opinion of the court, reimburse such owner for his reasonable attorney fees actually incurred because of the expropriation proceeding**, if the final judgment is that the plaintiff cannot acquire the real property by expropriation or if the proceeding is abandoned by the plaintiff. Any such award shall be paid from the same funds from which the purchase price of the property would have been paid.
>
> The rights of the landowner herein fixed are in addition to any other rights he may have under the Constitution of Louisiana. (Emphasis added).

Mr. Ristroph argues that La. R.S. 19:201 is his statutory authority to be awarded attorney fees. He contends that when Louisiana delegated to PTVI the authority to expropriate private property, which is exercised, it became an "agent" of the state and under the statute.

The crux of Mr. Ristroph's argument is that when Louisiana conferred upon a private entity, such as PTVI, the power to take private land, an "agency" relationship was created, which puts entities like PTVI within the statute, he could provide his entitlement to an attorney fee award.

Mr. Ristroph cites **Tennessee Gas Transmission Co. v. Violet Trapping Co.,**[1] 248 La. 49, 176 So.2d 425 (1965), and **Mongrue v. Monsanto Company,**[2] 249 F.3d 422, 429 (5th Cir. 2001), as authority for the premise that, because of this relationship with the state, PTVI now qualifies as an agency under La. R.S. 19:2[3] vested with the power of expropriation. The federal court in **Mongrue** stated that for a private entity to qualify under Louisiana law as an agent of the government for the purposes of establishing liability for an unconstitutional taking, the entity must have been expressly delegated the power of eminent domain. **Mongrue**, 249 F.3d at 429.

This statement made by the **Mongrue** court, although dicta taken out of context, does seem to imply that in that court's opinion, when the state delegated expropriation authority to a private entity,

---

[1] In **Tennessee Gas Transmission** the Louisiana Supreme Court stated that the only way a private entity obtains the power to expropriate is when it has been vested with this power by the state.

[2] In Mongrue, the U.S. 5th Circuit recognized that the power of eminent domain must have been expressly delegated by the sovereign to the private entity.

[3] The legislature listed specific categories of private entities that may expropriate property under our Constitution's takings clause.

an agency relationship was created. **Mongrue**, however, was not about an individual's right to attorney fees, nor was it decided by a Louisiana court. Moreover, discussion of "agency" or "agent" was not the basis of the **Mongrue** holding.

In presenting his argument, Mr. Ristroph uses the term "agency" in its generic, common law meaning. In Black's Law Dictionary 67 (8th ed. 2004), "agency" is defined as "a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions." Louisiana civil law, however, generally speaks in terms of mandate, not agency. Louisiana Civil Code article 2989 defines "mandate" as a contract by which a person, the principal, confers authority on another person, the mandatory, to transact one or more affairs for the principal. Here, there is no contract between the state and PTVI. Nothing in the record suggests that PTVI transacts affairs on behalf of the State of Louisiana or any of the other governmental bodies described in La. R.S. 19:201.

In La. 19:2, the Louisiana legislature listed specific categories of private entities that may expropriate under our Constitution's takings clause. However, nothing in that statute suggests that by delineating the types of private entities with power to expropriate, the legislature somehow intended all of these entities to thereby become "agents" of the state. The statute refers to the state or its political corporations or subdivisions created for the purpose of exercising any state governmental powers in La. R.S. 19:2(1); it then separately describes each other type of private entity to which the power to

expropriate is granted, including common carrier pipelines in La.R.S. 19:2(8). Because these types of private entities are separately listed, the implication is that these entities are not and do not become "agents" or "agencies" of any governmental body.

The Third Circuit Court of Appeal succinctly explained in **Louisiana Intrastate Gas Corporation v. LeDoux**, 347 So.2d 4, 7 (La. App. 3 Cir. 1977), why a similarly situated landowner was not entitled to attorney fees. It explained that La.R.S. 19:201 allows attorney fees to the landowner only when the expropriating authority is actually the state, a parish, a municipality, or an agency of any of them. **Id.** The court explained that the legislature, for whatever reason, limited recovery of attorney fees to a successful litigant only if the expropriation action was brought by the state or its political subdivisions and agencies. It commented that as a court, it was powerless to extend that statue's provisions by analogy to expropriators not included within its scope. **Id.** The court in **LeDoux** held that a private entity with powers to expropriate was not subject to the penalty provisions set out in the statute, since it was not the state, a parish, or municipality, or any agency of them. **Id.** We note that the **LeDoux** court did not directly discuss "agency," but the ruling of the case certainly implies that it did not consider that a private entity was a state agency.

As in **LeDoux**, the expropriating authority here is a private entity, and not the state, a parish, a municipality, or an agency of any of them; hence the provisions of La. R.S. 19:201 do not apply. We agree with the holding in **LeDoux**, and no straining of the word "agency" can make the statute apply.

Therefore, we are powerless to extend to Mr. Ristroph the attorney fees set forth in La. R.S. 19:201; PTVI does not fit within the statute.

Constitutional Entitlement to Attorney Fees

Mr. Ristroph next argues that La. Const. Art. I, § 4, entitled, "Right to Property," guarantees his right to attorney fee reimbursement. He claims that the phrase, "compensated to the full extent of his loss" mandates that he, the winner of his lawsuit, must be compensated for his losses, including attorney fees. Mr. Ristroph contends that this phrase means that he has a constitutional right to be reimbursed for his litigation expenses.

> Section 4(B) provides, in pertinent part, the following:
>
> Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation and **the owner shall be compensated to the full extent of his loss**. (Emphasis added).

This issue was also raised in **LeDoux**, but the court specifically expressed no opinion as to whether Article I, § 4 of the 1974 Constitution authorized attorney fees in the event of a successful "taking" or "damaging as a result of the taking," since the article did not apply to the case because there was no

"taking." **LeDoux**, 347 So.2d at 7 n.2. The court explained that when Article I § 4 was read in conjunction with La. R.S. 19:9, which deals with the manner in which property is valued for the purpose of compensating the owner, it becomes apparent that the phrase "to the full extent of his loss" dealt only with a situation when the property is "taken" by expropriation. **Id.** Neither in **LeDoux** nor in this case was there a taking.

A law review article written by Professor Lee Hargrave, entitled The Declaration of Rights of the Louisiana Constitution, in 35 La. Law. Rev. 1, 15-18 (1974-1975), detailed the history of how Article I, § 4 evolved through revisions at the Constitutional Convention into its final form. Pertinent excerpts of the article read as follows:

> The history of Section 4 reveals a desire to increase the level of compensation beyond that provided by existing state law. The change from the 1921 Constitution's language ("just and adequate compensation") to the new phrase ("compensated to the full extent of his loss") was deliberate, prompted by a belief on the part of the sponsors that inadequate awards have been provided under existing law. The new formula comes from the 1972 Montana Constitution, and was stated by the committee in comments as "**intended to permit the owner whose property has been taken to remain in equivalent financial circumstances after the taking.**" This level of compensation applies "in

every expropriation," whether by public agencies or private persons.

The change is far reaching. **Explaining his proposal, Delegate Louis Jenkins indicated it would even extend to costs of litigation and attorney fees: "[A]nd even if you win, you are going to lose, because of the cost of going to court, hiring an attorney, which you'll have to pay. So this would attempt to take into account that fact."** The author, too, was insistent on using the term "extent of his loss," rather [than] "the loss" to indicate that consideration be given to an owner's subjective intangible losses rather than only to objective determinations. The words, "[t]he full extent of his loss" were in the original committee proposal and were continued in the final compromise. Explaining the impact of the compromise, the author, Delegate Walter Lanier, indicated that the original breadth of the formula was to be continued. He referred also to "things which, perhaps, in the past may have been considered damnum absque injuria, such as the cost of removal and things like that . . . ."

The debate also indicates an understanding that the formula would cover moving costs and the cost of re-establishing a business whose premises had been taken. At one point, the

convention adopted an amendment requiring consideration of loss of aesthetic or historical values in locating public projects. Though this provision was not included in the final compromise language, it again displays the breadth of the provision. Giving the people more rights in this regard certainly was the aim. **In any event, the convention debate tends to confirm the committee's concept of full compensation as putting one 'in equivalent financial circumstances after the taking,"** including items not compensable under existing law. No doubt this provision will spawn much litigation, but it is clear that the level of expropriation awards must be expanded to include moving expenses, business losses because of change of location, and compensation for some intangible losses not covered under prior law. Acceptance of such a radical and expensive concept in the state's law may be partly explained by the experience of many of the delegates under recent federal legislation which had greatly increased the required payments in case of expropriations paid with federal funds.

Changing the justification for exercise of the eminent domain power from the existing constitutional language ("for public purposes" and

purposes of public utility") to a higher standard ("a public and necessary purpose) provoked intense controversy. It was only resolved by the final compromise provision which applied the higher standard to takings by private entities but continued the old standard to takings by public agencies.

Reference to "payment to the owner or into court for his benefit" was not meant to restrict the class of persons who could claim compensation to "owners" in a technical property law sense. The purpose was to give citizens more rights, and the term, as stated by the author of the final compromise, "is intended to be used in its broadest sense, in other words, a leasehold interest in land is a property right as you and I well know, and there's been some trouble over that in the past." In fact, when one couples this intent with the requirement that be to the full extent of one's loss, the purpose emerges of giving protection to a broader category of persons than was previously the case. It is also clear that by referring to property "taken or damaged" compensation must be given not only when ownership or a real right is taken, but also when property is damaged. (Footnotes omitted and emphasis added).

It is unclear whether Delegate Louis "Woody" Jenkins' comments suggested or proposed that a

landowner would be entitled to attorney fees if he defeated having his property expropriated. However, this speculation is unnecessary, since the final version only provides attorney fees to the landowner whose property was "taken."

The record reflects that Mr. Ristroph has incurred over $150,000 in attorney fees to defeat this private pipeline entity that tried to expropriate his property. We cannot award Mr. Ristroph compensation "to the full extent of [his] loss" pursuant to Article I, § 4, since there was no "taking." Thus, this assignment of error is without merit.

EXCLUSION OF EXPERT WITNESSES

In Mr. Ristroph's next assignment of error, he argues that the trial court erred as a matter of law by excluding the testimony of Christopher Scott, Chad Scott, and John Theriot. He contends that their testimony pertained to the safety and economic impact of PTVI's proposed benzene pipeline with respect to the transportation of benzene via barge. He argues that PTVI put safety at issue when it designated Thomas Orlofsky to testify as to the "public purpose" of the expropriation. He claims that Mr. Orlofsky testified that "safety" was one of the primary purposes served by the pipeline. Mr. Ristroph argues that to contradict this issue, he was forced to retain certain experts to aptly demonstrate that the proposed benzene pipeline would not promote the health or safety of the public. He argues that the trial court erred by not allowing these experts to testify on this issue.

The decision of whether to admit or exclude expert testimony is one let to the considerable

discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of that discretion. **Moory v. Allstate Insurance Company**, 04-0319, p. 3 (La. App. 1 Cir. 2/11/05), 906 So.2d 474, 477. the trial court plainly stated in the transcript that from a relevance standpoint, it considered the witnesses' testimony unnecessary. It also stated that testimony regarding how efficiently and safely barge traffic operated was not the issue for the court to decide. Nor was it particularly concerned about the relative safety of pipeline versus barge operations.

A trial court has discretion in conducting a trial in an orderly, expeditious manner, and to control the proceedings so that justice is done. La. C.C.P. art. 1631. This discretion includes the admissibility of a witness's testimony. **Sims v. Ward**, 05-0278, p. 16 (La. App. 1 Cir. 6/9/06), 938 So.2d 702, 711. These witnesses' testimony was not pertinent to the outcome of this lawsuit. Accordingly, we conclude that the trial court did not abuse its discretion in granting PTVI's motion in limine and excluding these witnesses' testimony. This assignment of error is without merit.

FULL AMOUNT OF EXPERT FEES

Mr. Ristroph argues in his final assignment of error that the trial court erred in denying the full amount of expenses he incurred in good faith in retaining experts, including those whose testimony was excluded prior to trial. He argues that he incurred $54,569.27 in costs for his experts to successfully defend his case, but he was only awarded $16,381.62. He argues that this case involved complex issues with regard to expropriation. One witness testified in the field of

real estate appraisal in the industrial corridor. Other witnesses testified about environmental kinodynaimics, chemical engineering, transportation, and T-SCREEN air modeling. Mr. Ristroph contends that the paperwork accompanying their bills demonstrates that a great deal of time was spent preparing for trial in collaboration with the other experts and individually.

The trial court has discretion to assess costs of a suit in any equitable manner. **Rideau v. State Farm Mut. Auto. Ins. Co.**, 06-0894, p. 19, (La. App. 1 Cir. 8/29/70), 970 So.2d 564, 581, writ denied, 07-2228 (La. 1/11/08), 972 So.2d 1168. On appellate review, only a showing of an abuse of discretion warrants reversal of the trial court's costs allocation. **Id.**

After reviewing the facts of this case and the expert costs not taxed to PTVI, we find no abuse of discretion in the trial court's allocation. This assignment of error is without merit.

DECREE

Based on the foregoing, the judgment of the trial court is affirmed. The costs of this appeal are assessed against Pipeline Technology VI, LLC.

AFFIRMED

18TH JUDICIALDISTRICT COURT
PARISH OF IBERVILLE
STATE OF LOUISIANA

SUIT NO: 63573 DIV: "D"

PIPELINE TECHNOLOG VI, LLC

VERSUS

DON L. RISTROPH

JUDGMENT

This matter came for before the Court for a trial on the merits beginning on November 28, 2006 and lasting through November 30, 2006. After considering the evidence and after due deliberations,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that for reasons stated fully within this Court's January 19, 2007 Opinion, that the Plaintiff's Petition for Expropriation is hereby denied.

The Defendant's Motion to Tax Costs and Fees came before the Court on February 23, 2007. After considering the evidence and after due deliberations,

IT IS HEREBY ORDRED, ADJUDGED AND DECREED that the Plaintiff pay the following costs:

Expert Fees Total	$15,637.50
Dr. Thibodeaux	$3,162.50
Dr. Winbish	$1,400.00
Sherri Pruitt	$5,687.50

Chad Scott	$5,387.50
Court Costs:	$644.12
Map Fee:	$100.00
TOTAL FEES	**$16,381.62**

IT IS ALSO ORDERED that the Defendant's request for expert fees for John Theriot and Chris Scott be and is hereby denied.

IT IS ALSO ORDERED that the Defendant's request for attorney's fees be and is hereby denied.

IT IS FURTHER ORDERED that pursuant to La. C.C.P. art. 1841 this is deemed a final Judgment.

Thus done and signed on this 1 day of March, 2007.

s/Honorable William C. Dupont

Judge, 18th Judicial District Court

s/Marilyn M. Young

DY CLERK – EXOFFICIA

IBERVILLE, LOUISIANA

18TH JUDICIALDISTRICT COURT
PARISH OF IBERVILLE
STATE OF LOUISIANA

PIPELINE TECHNOLOG VI, LLC

VERSUS

DON L. RISTROPH

NUMBER 63,573 DIVISION "D"

OPINION

This matter arises from a petition for expropriation filed by Pipeline Technology VI, LLC against Don L. Ristroph. The basis for this expropriation suit revolves around Pipeline Technology's intent to install a dedicated benzene pipeline form the Dow Chemical Company Plant in Plaquemine, Louisiana to Total Petrochemicals Plant located in Carville, Louisiana. The route selected by Pipeline Technology traverses numerous properties including the property of Mr. Ristroph, who now opposes the plaintiff's right to expropriate.

Pipeline Technology asserts its right to expropriate pursuant to La. R.S. 19:1 et seq, and La. R.S. 45:251, et seq. Expropriation rights are further controlled by La. Constitution of 1974, Article I Section 4.

> *Section 4. (A) Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.*

(B) Property shall not be taken or damaged by the ***state*** *or its political subdivisions except for* ***public purposes*** *and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any* ***private party*** *authorized by law to expropriate,* ***except for a public and necessary purpose*** *and with just compensation paid the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss. No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction.*

La. Const. 1974, Article I Section 4

Where a price cannot be agreed upon with the owner, any of the following may expropriate needed property.

(8) All persons included in the definition of common carrier pipelines as set forth in >R.S. 45:251;

La. R.S. 19:2(8)

****

As used in this Chapter, the following terms have the meaning ascribed to them in this Section, unless the context clearly indicates otherwise:

(1) "Common carrier" includes all persons engaged in the transportation of petroleum as public utilities and common carriers for hire; or which on proper showing may be legally held a common carrier ***from the nature of the business conducted, or from the manner in which such business is carried on.***

(2) "Petroleum" means crude petroleum, crude petroleum products, distillate, condensate, liquefied petroleum gas, any hydrocarbon in a liquid state, any product in a liquid state which is derived in whole or in part from any hydrocarbon, and any mixture or mixtures thereof; provided, however, that such term shall not include methanol synthetically produced from coal, lignite, or petroleum coke.

(3) "Pipe line" includes real estate, rights of way, pipe in line, telephone and telegraph lines or other communication systems, tank facilities as herein designated, and necessary for the proper conduct of its business as a common carrier, all fixtures, equipment and personal property of every kind owned, controlled, operated, used or managed, in connection with, or to facilitate the transportation, distribution and delivery of petroleum through lines constructed of pipe.

La. R.S. 45:251

In order to prevail in the expropriation suit, the plaintiff must prove: (1) that they are a "common carrier", (2) that the expropriation is for a public and

necessary purpose, and (3) that negotiations were not arbitrary and capricious and made in good faith.

Common Carrier

One may meet the legal definition of a common carrier under La. R.S. 45:151 by one of two methods. A common carrier is one that is engaged *"in the transportation of petroleum as public utilities and common carriers for hire"* ***OR*** *" from the nature of the business conducted, or from the manner in which such business is carried on."*

Prior to trial the parties stipulated that "benzene" was a petroleum product. As such, considering the simple language of the statute, Pipeline Technology VI, LLC would qualify as a "common carrier" and be entitled to the right of expropriation **IF** it provides such transportation as a public utility for a public and necessary purpose.

Public and Necessary Purpose

In order to meet the public and necessary purpose provisions of our constitution, the expropriation must show that there is a public necessity or demand for the expropriation and that the amount and nature of the acreage taken is reasonably necessary for the purpose of the expropriation. SEE: Illinois Central Railroad Co. V. Mayeaux, 301 F.3d 359, (2002).

Plaintiff's petition states *"The proposed pipeline will have the capability of providing bulk transportation of benzene to area chemical and petrochemical plants along the Mississippi River."*

> *It is not the number of persons who initially contract for use of the line, nor the number who might actually use it at any given time,*

which determines its public character, but rather, the extent of the right to its use by the public.

Texas Pipeline Company v. Stein 190 So.2d 244 (4th Cir. 1966)

Testimony at trial indicates that the initiating purpose of this pipeline was to establish a dedicated benzene pipeline from the Dow Chemical Company Plant in Plaquemine to the Total Petrochemical's Plant across the Mississippi River in Carville. However, several witnesses for the plaintiff testified that there were other possible customers and that the plaintiff planned to contact others to use the pipeline. The defendant questioned the ability to transmit proprietary benzene from different manufacturers in the same pipeline, however, the Court feels the witnesses adequately addressed the ability to do so.

The existence of another benzene pipeline (Kinder Morgan to Rubicon) across the Mississippi River came out during the testimony. What is interesting and confusing about this fact is that the plaintiff's witnesses indicated that pipeline was not a common carrier and only transmitted between two customers. Since the pipeline at issue was initiated to also transmit benzene between only two customers, i.e., Dow and Total Petrochemical, the only difference seems to be testimonial intent to allow others to use the pipeline at issue. As stated in **Texas Pipeline Company, supra,** public character of a pipeline is determined by "*the extent of the **right** to its use by the public.*" In this case that right to use seems dependent upon the unilateral consent of the plaintiff and its contract with Dow.

The Court was not so convinced by the witnesses that this right of use by the public is irrevocable.

Good Faith Negotiations

The following statement of law explains the requirements of good faith negotiations and the issue of route location.

> *However, the extent and location of the property to be expropriated are within the sound discretion of the body possessing the power of eminent domain, and these determinations will not be interfered with by the courts if made in good faith . . . Questions such as the location of the expropriation, the extent of the property taken, the nature of the title to be taken, and the wisdom of pursuing the particular improvement project relate to the necessity of the taking. The standard is whether the expropriator, in selecting the location and extent of the property to be expropriated, acted in bad faith or so capriciously or arbitrarily that its action was without an adequate determining principle or was unreasoned. Criteria to be considered by the expropriator include the availability of an alternate route, costs, environmental factors, long-range area planning, and safety considerations. The expropriating agency may abuse its discretion by acting without considering and weighing the relevant factors, that is, by acting arbitrarily . . . . However, the mere availability of a feasible alternative location is not, by itself, an indication that the expropriator has acted arbitrarily or capriciously in making its selection.*

Thus, the expropriating authority must show the public and necessary purpose for the expropriation and that, prior to filing the petition for expropriation, it offered to compensate the owner with an amount equal to at least the lowest appraisal or evaluation . . .

The burden is on the defendant owner to establish that the decision of the public body to expropriate the property is unreasonable and in bad faith.

Acadian Gas Pipeline System v. Bourgeois, 890 So.2d 634 (La. App. 5 Cir. 2004)

Maps of alternate routes were introduced at trial and the plaintiff attempted to show how it had investigated alternate routes in its process to expropriate.

The record indicates that this expropriation suit with this specific route through the defendant's property was field March 17, 2006. Testimony indicated that the route was permitted with the Corps of Engineers also in March or May of the same year. A map reflecting the plaintiff's alternate routes purportedly examined was introduced by the Plaintiff (PT 58). What is troubling is that this map is dated June 19, 2006, after the route of expropriation was determined, chosen and suit filed. Plaintiff's witness, Mr. Mark Fritchie testified that the only reason the map of alternate routes was done was because the U.S. Army Corps of Engineers requested it at the time.

It seems that the criteria that an expropriator should consider **prior** to expropriation as set forth in Acadian, supra, being "*the availability of an*

alternate route, costs, environmental factors, long-range area planning, and safety consulations" were not accomplished until after the expropriation suit was filed, and only accomplished seeming only to comply on paper. The plaintiff's as shown on Exhibit PT 4-A were basically following Dow pipeline corridor until they reached the defendant's property and then deviated crossing and cutting across virgin territory of defendants property. None of the consideration contained in Acadian, supra, was considered prior to contacting the defendant or making the decision to expropriate.

The necessity to cross the defendant's property where the plaintiff wants to expropriate or the cost of that route did not seem to fall into the plaintiff's consideration. The plaintiff, in choosing the route, had deviated from the logical route of continuing along the Dow pipeline corridor, which would have caused very little damage to anyone and cost virtually nothing. Mr. Fritchie specifically testified if wasn't "necessary" to cross the middle of the defendant's property as indicated on their map, and they could have deviated and gone down the defendant's south property line and not cut across his property at all, at very minimum damages and cost.

Considering the evidence in total, it is the opinion of the court that the plaintiff's have failed to prove the public and necessary purpose of this pipeline and that the defendants have sustained their burden that the defendant's actions in negotiations were arbitrary and capricious in its site selection. The plaintiff's petition for expropriation is denied.

The defendant is ordered to prepare and submit a judgment consistent with this opinion after conferring with the plaintiff.

Plaquemine, Louisiana, this 19th day of January, 2007.

s/William C. Dupont, District Judge, Div. D